



# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 610

ROBERT A. WATTS, PETITIONER,

vs.

STATE OF INDIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF INDIANA

## INDEX

	Original	Print
Record from Circuit Court of Shelby County, Indiana	1	1
Order filing and assigning indictment	1	1
Assignment and plea	1	1
Motion to quash indictment	2	2
Order overruling motion to quash and motion to suppress	4	3
Transcript of hearing on motion to quash	5	3
Caption and appearances	5	3
Defendant's witnesses:		
Scotty Scott	6	
Thomas Ervin	11	7
William S. Henry	13	8
Al Magenheimer	17	10
Glenn W. Parrish	20	12
Judson L. Stark	29	17
State's witnesses:		
Judson L. Stark (recalled)	37	22
Glenn W. Funk	48	28
Reporter's certificate (omitted in printing)	52	
Verdict and judgment	53	30
Defendant's motion for new trial	54	31

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	Original	Print
Proceedings in Supreme Court of Indiana	58	34
Assignments of error	58	34
Clerk's certificate (omitted in printing)	60	
Opinion, Starr, J., and judgment	61	37
Order denying petition for rehearing	69	42
Order granting motion for leave to proceed in forma-pau- peris; granting petition for writ of certiorari and trans- ferring case to appellate docket	70	42

[fol. 1]

**IN CIRCUIT COURT OF SHELBY COUNTY, STATE OF  
INDIANA**

**ORDER FILING AND ASSIGNING INDICTMENT**

The following Indictments are now filed and assigned to Criminal Court of Marion County Division Two, all pursuant to the order of the General Term of this Court, entered on November 19, 1947, in the General Term order Book Volume One Page 27.

Cr. 4522-Z      Robert Austin Watts      First Degree Murder

**IN CIRCUIT COURT OF SHELBY COUNTY**

**ARRAIGNMENT AND PLEA**

And afterwards to wit, November 22nd, 1947, the same being the 120th Judicial day of the July Term 1947 of said court, before the Honorable Saul I. Rabb, Judge thereof, the following further proceedings were had herein to wit:

State appears by Judson L. Stark, Prosecuting Attorney and Rufus Kuykendall, his deputy and Raymond Tindall, his deputy defendant appears in person and by counsel, Robert Rutherford and Henry Perry, defendant arraigned and pleads not guilty to each count of the indictment and reserves the right to file any pleadings and reserves the right to change his plea. This cause is now set for trial on December 8, 1947, at 9:30 A.M.



[fol. 2] IN CIRCUIT COURT OF SHELBY COUNTY

STATE OF INDIANA

VS.

ROBERT AUSTIN WATTS

**MOTION TO QUASH INDICTMENT**

Comes now the defendant in the above entitled cause of action and moves the court to quash the indictment and each count thereof for the following reasons to-wit:

1. That in the selection of the Grand Jury Negroes, also known as colored persons, were excluded from serving on the grand jury because of their race and color.

2. That no person of Negro blood or colored person was permitted to serve on the grand jury that returned the indictment against defendant, who is a Negro.

3. That the grand jury which found the indictment had no authority to inquire into the offense charged.

4. That the indictment does not state facts with sufficient certainty.

5. That the indictment does not state facts sufficient to constitute a public offense.

Exclusion of persons from services on grand juries on account of race or color is a violation of 14th Amendment to the Federal Constitution, *Rogers v. Alabama*, 192 U. S. 226..

If it should be claimed that in the selection of grand jurors persons were excluded from the jury on account of race or color, such fact should be taken advantage of by motion to quash an indictment returned by such jury, and not by an [fol. 3] application to remove the cause to a United States Court. *Gibson v. Mississippi*, 162 U. S. 565.

The proper mode to test the sufficiency of an indictment or information is by motion to quash, *State v. Beach*, 147 Ind. 74.

A motion to quash will raise the question as to the proper return and indorsement of the indictment *Johnson v. State*, 23 Ind. 32.

The defendant was without counsel and had no opportunity to file his said motion to quash prior to his arraignment.

Wherefore, defendant respectfully prays that said motion to quash be in all things sustained.

Henry Perry, Robert D. Ellison, Emerson J. Brunner, Warren M. Brown, Attorneys for defendant.

[fol. 4] IN CIRCUIT COURT OF SHELBY COUNTY

ORDER OVERRULING MOTION TO QUASH AND MOTION TO SUPPRESS

On the defendants, motion to quash heretofore filed, motion is now overruled exceptions to the defendant; the motion to suppress is overruled, exceptions to the defendant.

[fol. 5] IN CIRCUIT COURT OF SHELBY COUNTY, JANUARY TERM, 1948

No. 4723

THE STATE OF INDIANA

VS.

ROBERT AUSTIN WATTS

**Hearing on Motion to Quash Indictment**

Before the Honorable Harold G. Barger, Judge of the Shelby Circuit Court, on January 12, 1948, being the seventh judicial day of the January Term, 1948.

**APPEARANCES:**

For the State of Indiana: Judson L. Stark, Prosecuting Attorney, Marion County, Indiana; Glenn W. Funk, Deputy Prosecuting Attorney, Marion County, Indiana; Mr. Harold Meloy, Prosecuting Attorney, Shelby County, Indiana; and others.

For the Defendant: Mr. Henry Perry, Mr. W. S. Henry; Mr. Warren M. Brown, and Mr. Emerson J. Brunner; Mr. Robert Ellison.

4  
[fol. 6] MR. SCOTTY SCOTT, a witness called by the defendant, having been duly sworn, testified as follows, to-wit:

Direct examination.

Questions by Mr. Perry, Attorney for Defense:

Q. State your name, please.

A. Scotty Scott.

Q. And what is your address or residence?

A. 2721 Parrish Avenue, Indianapolis.

Q. Marion County, Indiana?

A. It is.

Q. How long have you lived in Marion County?

A. About seventeen years.

Q. And in your period of residence in Marion County, do you know of any occasion of negroes that served on the Grand Jury during the seventeen years?

Mr. Stark, Prosecuting Attorney: To which the State objects for the reason that it is just hearsay and doesn't have anything to do with this case.

Court: Objection overruled. Go ahead.

A. I do not.

Q. Now to your knowledge are there negroes, otherwise known as colored people, who are property owners and [fol. 7] competent to serve on Grand Jury in Marion County, to your knowledge?

A. There are.

Mr. Stark, Prosecuting Attorney: To which the State objects for the reason that he is not a lawyer and is not competent to pass on such questions.

Court: Part of the question calls for a conclusion, "and are competent to serve on Grand Jury", but I'll overrule the objection.

Q. Do you know they are property owners?

A. That's right, I do know that.

Q. Are you acquainted and know about the population of negroes in Marion County?

A. I do.

Q. About how many are there?

A. Sixty five thousand in the last estimate by the Chamber of Commerce.

Q. Are you acquainted and know about the general population of Marion County?

A. I am.

Q. About what is it?

A. About 486,000 in Marion County.

That's all.

[fol. 8] Cross-examination.

Questions by Mr. Stark, Prosecuting Attorney:

Q. You say your name is Scotty Scott?

A. That's right.

Q. You work for a paper, do you, in Indianapolis?

A. Indianapolis Recorder.

Q. Do you know who draws the venire for Grand Juries?

Mr. Perry, Attorney for Defense: I am going to object to that, "you know who draws the venire". That has nothing to do with whether negroes serve on Grand Jury.

Court: Objection overruled.

Q. Do you know who draws them?

A. I do not.

Q. Did you ever attend any drawing?

A. I have not.

Q. You don't know anything about how they were selected or how they were drawn at any time, do you?

A. I do not.

Q. You don't know whether there was any discrimination shown in selecting them at all, do you?

Mr. Perry, Attorney for Defense: I am going to object to that. The question is whether the negroes served on the Grand Jury. That's the only thing.

[fol. 9] Court: Objection overruled.

A. I do not know that, as to discrimination, I couldn't say.

Q. Do you know whether or not any negroes were actually called, selected and called in the selection of the Grand Jury?

Mr. Perry, Attorney for Defense: I'm objecting for the reason he says he didn't know of any that had served.

Court: Objection overruled.

A. Well, I don't recall any having said in my hearing and presence that they had been called for Grand Jury serv-



ice in Marion County. I don't remember any negroes having sat that had been called for Grand Jury service.

Q. You haven't examined the list to see whether or not any negroes were served to appear, have you?

A. I have not.

Mr. Perry: I'm objecting to that. This witness has no opportunity to go and serve the list and knows nothing about that. That's not in the line of this question.

Court: Objection overruled.

Mr. Henry, Attorney for Defense: I am objecting further—what list?

[fol. 10] Court: One attorney will make the objection.

Mr. Henry: I'll withdraw the objection.

Q. Mr. Scott, do you know which Grand Jury returned the indictment in the Burney case which we are now about to try?

Mr. Perry, Attorney for Defense: Object to that. No Burney case was spoken about to this witness. That's not cross-examination.

Court: That of course is the case that's being tried.

Mr. Perry: Your Honor, that's not cross examination. The only thing this witness was called to testify for was whether negroes have served on the Jury. The Burney case was not mentioned. It's not proper.

Court: Objection overruled.

A. The Grand Jury which returned the indictment was the one which served up until December 31st of last year.

Q. Do you know, have any knowledge of your own, that negroes were probably excluded from the list drawn and served and called as prospective Grand and Petit jurors?

A. I do not.

Mr. Perry, Attorney for Defense: I am objecting to that, [fol. 11] to go into this case. I am making objection to that. The only thing this witness was called to show whether he knows negroes served on Juries in Marion County during this term.

Court: Objection overruled.

Mr. Stark, Prosecuting Attorney: It's already been answered.

Court: Next question.

That's all.

Witness excused.



7

THOMAS ERVIN, a witness called on behalf of the defendant, having been duly sworn, testified as follows, to wit:

Direct examination.

Questions by Mr. Perry, Attorney for Defense:

Q. Tell the Court your name.

A. Thomas Ervin.

Q. And what is your address?

A. 2315 Guilford Avenue, Indianapolis.

Q. Is that in Marion County?

A. It is.

Q. You have been a resident of Marion County how long?

[fol. 12] A. Twenty one-years.

Q. And do you have any knowledge during the twenty-one year period you were a resident of Marion County, to your knowledge has any negroes, colored persons, served on Grand Jury during that term?

Mr. Stark, Prosecuting Attorney: I think, if the Court please, the State wants to object to that question. There is nothing in the law that requires that they shall, so it would be immaterial since there is no law that requires they shall. That's not the point.

Court: Objection overruled.

Go ahead.

A. I do not.

Q. Now you know to your knowledge of such negroes who are property owners, citizens, and voters of Marion County?

A. I think there is.

Q. And are you acquainted with the population of negroes in Marion County?

A. I am.

Q. And what would you say it is?

A. 65,000.

Q. And what would you say the general population is in Marion County?

[fol. 13] A. I think it is about a half million.

That's all.

No Cross-examination.

WILLIAM S. HENRY, a witness called on behalf of the defendant, having been duly sworn, testified as follows, to-wit:

Direct examination.

Questions by Mr. Perry, Attorney for Defense:

Q. Tell the Court your name.

A. William S. Henry.

Q. And what is your address?

A. 305 Harvard Place, Indianapolis, Indiana.

Q. And that is in Marion County?

A. In Marion County, Indiana.

Q. You have been a resident there how long?

A. Forty-four years.

Q. And I will ask you within the last twenty-five years if you have any knowledge of any negroes or colored persons serving on Grand Jury in the last twenty-five years?

A. I have no knowledge of any such colored people serving on Grand Jury for the last twenty-five years in Marion County.

[fol. 14] Q. Do you know of negroes, otherwise colored people, that own real estate and are citizens and voters of Marion County?

A. I do.

Q. And to your knowledge about what is the population of negroes in Marion County?

A. Between sixty and seventy thousand.

Q. What is the general population of Marion County?

A. About four hundred eighty six or ninety thousand.

Q. Do you know how many persons are called for Grand Jury service? How many persons it takes to make a Grand Jury?

A. I think it's about six.

Q. And the Grand Jury is chosen how often?

A. Every—twice a year.

Q. That would make how many persons called in a year?

A. Twelve.

Q. During the last twenty-five years you don't know of any negroes serving?

A. I do not.

That's all.

No Cross-examination.

Questions by the Court, Judge Harold G. Barger questioning:

Q. Could there have been some called and you not know? [fol. 15] about it?

A. No, they couldn't have been, Judge. I have been a lawyer there for thirty-eight years and I would have particularly known what had there been.

Q. You examine the list, do you?

A. The list wouldn't disclose, Judge. The objection I started to make there, there is no difference by the name of one man and the name of another one. The list wouldn't show colored or white. The list wouldn't show anything to the person who made the examination.

Cross-examination.

Questions by Mr. Stark, Prosecuting Attorney:

Q. Mr. Henry, you don't have any proof that there has been any actual discrimination on the part of the people who did the drawing, do you?

A. The only proof I have, Mr. Stark: the law says if there are colored people qualified to serve and not called upon to serve, it is discrimination per se.

Q. And were you present at the time of the selection of the last Grand Jury?

A. I was not.

Q. Do you know whether or not some negroes were called and put in the box and questioned as prospective Grand Jurors?

[fol. 16]. Mr. Perry, Attorney for Defense: I am going to object to that question, whether they are "called." The question is that negroes have been excluded from serving. I don't care if they were called.

Mr. Stark, Prosecuting Attorney: You haven't put any proof in on it yet.

Court: Objection overruled.

A. I don't know of my own knowledge that they were called, but I will gamble that they weren't.

Mr. Stark: I'll take it further and swear they were. What do you think of that?

Court: Just ask your questions and the Court will rule on it. If you have any evidence, present it.

Q. You really then made no investigation to find out whether such was the case or not, did you?

A. I had no occasion—

Q. Just you did or you didn't, one or the other.

Mr. Perry, Attorney for Defense: I'm objecting—

Court: I'll withdraw the answer. Make your objection.

Mr. Perry: I'm objecting to the question, because this [fol. 17] witness is not a person who has access to the clerical list, not a part of the Jury Commissioners.

Court: Objection overruled.

A. No, I made no investigation, had no occasion so to do.

Q. And you haven't made any investigation or had any occasion so to do for the last twenty-five years, have you?

A. Only that there were none called out of the large number that were qualified.

Q. Mr. Henry, you don't mean not called. You mean unqualifiedly selected and sworn, don't you?

A. That's right.

That's all.

Witness excused.

AL MAGENHEIMER, a witness called on behalf of the defendant, having been duly sworn, testified as follows, to-wit:

#### Direction examination.

#### Questions by Mr. Perry, Attorney for Defense:

Q. Tell the Court your name.

A. Al Magenheimer.

Q. Where do you live?

A. 40 South Alabama Street, the Marion County Jail.

[fol. 18] Q. And how long have you been a resident of Marion County?

A. Twenty-five years.

Q. And during the twenty-five years you have been a resident of Marion County, tell the Court, to your knowledge, if you have any knowledge of negroes, otherwise known as colored persons, serving on Grand Jury, and if so when it was and who it was.

A. I have no knowledge.

Q. And you are well acquainted with a large number of colored people around town, aren't you?

A. Yes.

Q. You know negro people that own real estate, don't you?

A. I do.

Q. And you are acquainted with the population of negroes in Marion County?

Mr. Stark, Prosecuting Attorney: That's been gone over and it's public knowledge. I don't see why we take up the time with such things.

Court: Objection overruled.

Q. It's over sixty thousand.

Q. And what would you say, in your opinion, is the general population of Marion County?

A. Over half a million.

That's all.

[fol. 19] Cross-examination.

Questions by Mr. Stark, Prosecuting Attorney:

Q. Mr. Sheriff, when you say you have no knowledge that they have served, you don't have any knowledge that they haven't served on Grand Jury either, do you?

A. I do not.

Q. You just haven't given any attention to that, is that right?

A. That's right.

Q. As Sheriff of Marion County, your deputies do serve the subpoenas for Grand and Petit Jurors, don't they?

A. That's right.

Q. And in that natural course of events you know whether or not colored people are frequently served upon these occasions?

A. We have quite a few papers to serve over there. I couldn't just say what they are. You see we serve over 6,000 papers per month.

Q. And you serve whatever list you are ordered as Sheriff to serve, do you not?

A. We do.



Q. Without regard to whether they are colored or white?  
A. That's right.

That's all.

Witness excused.

[fol. 20] GLENN W. PARRISH, a witness called by the defendant, having been duly sworn, testified as follows, to-wit:

Direct examination.

Questions by Mr. Perry, Attorney for Defense:

Q. Tell the Court your name.

A. Glenn W. Parrish.

Q. And where do you live?

A. Marion County, Indiana.

Q. How long have you lived in Marion County?

A. Fifty years.

Q. Now in the last twenty-five years, last thirty years, I will ask you if you know of any occasion that negroes, colored persons, any colored persons served on the Grand Jury, and if so, when and who it was.

A. No, I do not, Counsellor, I do not know.

Q. Now are you acquainted with the population—Strike. You know a number of colored people in Marion County?

A. Quite a few, yes.

Q. To your knowledge are they property owners and voters there?

A. Yes.

Q. And are you pretty well acquainted with the population—what would you say the population is of negroes in [fol. 21] Marion County?

A. I think the last survey of the Chamber of Commerce gave 65,000.

Q. And what would you say—now what would you say the general population is?

A. I think it's 460,000; 465,000, something like that.

Q. Now do you know how many grand jurors served at a time?

A. Yes, sir.

Q. How many?

A. Six.

Q. And for how long a period?

A. One term of Court, six months.

Q. That would make twelve a year?

A. Twelve a year.

Q. And do you know how they are selected?

A. Yes, sir.

Q. All right. Tell the Court.

A. Their names are drawn from a box by the duly qualified jury commissioners.

Q. And who sends out for these names, do you know?

A. The sheriff.—Oh, for the names? Pardon me, sir.

The Secretary of the Jury Commissioners gets the name.

Is that the point you wanted?

Q. Who sends out for the names?

A. The Secretary of the Jury Commissioners.

Q. Who is that?

[fol. 22] A. Claycombe, Bob Claycombe.

Q. Each jury commissioner writes out the names of the persons?

A. Yes.

Q. Where does he get the names?

A. Gets them from the tax list.

Q. That's the general list of the whole—

A. —Yes, all the tax payers of Marion County.

Q. You don't have any personal knowledge, you say, of any negroes serving in the last thirty years?

A. No.

#### Cross-examination.

#### Questions by Mr. Stark, Prosecuting Attorney:

Q. You are the deputy clerk, aren't you?

A. Yes.

Q. You have seen those tax duplicates yourself, haven't you?

A. Yes, sir.

Q. It doesn't show on those whether a person is colored or white, does it?

A. No, it doesn't.

Q. You haven't seen any evidence of discrimination on the part of the jury commissioners of the names drawn, have you?

A. None whatever.

Q. When you say the jury commissioners draw the names, you mean the County Clerk actually draws the names out, [fol. 23] of the box, doesn't he?

A. That's right.

Q. As a matter of fact, they are all shook up and drawn out and written down in the order they are pulled out, isn't that right?

A. That's right.

Q. In that box there are a good many colored people's names, isn't that right?

A. Yes, sir.

Q. You have seen that happen, haven't you?

A. Many times.

Q. You were up there now the last time the Jury was so drawn, weren't you?

A. Yes.

Q. Did you see any colored people drawn from the Jury box?

A. Yes, sir.

Q. And selected?

A. Yes, sir.

Q. Of course, you did. That's all.

Redirect examination.

Questions by Mr. Perry, Attorney for Defense:

Q. I want the names of those colored people that were drawn in this jury the last time, if you were there and in [fol. 24] the Clerk's office, I want to know who they were and I want them in Court. Who were they?

A. I do not know. I don't know.

Q. I want their names and their addresses.

A. No, I can't remember that well.

Q. Now, how many names are drawn from the box for Grand Jury service at a given time?

A. Seventy-five.

Q. And how many were drawn in this case that's before the Court?

A. Seventy-five.

Q. Who appoints the Grand Jury from the list that is drawn up?

Mr. Stark, Prosecuting Attorney: I want to object to that because this man is not a lawyer. You don't appoint them. It's a question of selecting them according to law.

Q. Who made the selection of this particular Grand Jury?

A. The judges of the January term of Criminal Court assisted by the Prosecutor.

Q. The judges assisted by the Prosecutors? And out of the seventy-five names that were drawn for this Jury was a negro chosen among the six?

A. No.

Q. And you can't give any name of any negro for thirty years that has even been called for jury service, can you?  
[fol. 25] A. Oh, no.

That's all.

#### Recross-examination.

#### Questions by Mr. Stark, Prosecuting Attorney:

Q. You don't know that some haven't served, do you, in the last thirty years? You haven't looked at all of them, have you?

A. No, to my knowledge, that's all. My knowledge doesn't cover the entire—

Q. You don't know that's what it is one way or the other, do you?

A. No.

Q. And when you talk about those that are called and selected for possible service, without knowing the names, you can tell—

Mr. Perry, Attorney for Defense: I am objecting to him testifying.

Court: Wait till he finishes his question; then you can object.

Q. —by looking at them whether they're colored or not, can't you?

A. No, sir.

Q. I mean when they come into the room, can't you?

A. Oh, yes, sir.

Q. That's the way you can tell, by seeing them, that —  
[fol. 26] they have been put into the box?

Mr. Perry, Attorney for Defense: Object to this man testifying. I am asking him to give names and addresses.

Court: Do you have any questions to ask. If you do, ask them.

Questions by Mr. Perry, Attorney for Defense:

Q. You testified that the Prosecutor of Marion County helped select the Jury that is trying this man?

A. Yes, sir.

Q. The Grand Jury?

A. Yes, sir.

Q. And the proportion of negroes in Marion County, according to statements given by you is seven to one, is that correct?

A. That's about right, yes.

Q. In thirty years, to your knowledge, you can't name one that has been called?

Mr. Stark, Prosecuting Attorney: We object to the repetition. We have been over that once. How many times are we expected to go over it?

Court: I'll sustain the objection. The question has [fol. 27] already been asked and answered.

Mr. Perry: Your Honor, I haven't asked the question of whether—I asked the proportion of negroes in Marion County is seven to one. Now in the thirty-years you know of any negroes being called to jury service, and he says no, and now out of the seventy-five—

~~Mr. Stark, Prosecuting Attorney: If the Court please—~~

~~Court: Let's just keep the record clear and one of you at a time.~~

Mr. Perry: That's all.

Questions by Mr. Stark, Prosecuting Attorney:

Q. As a matter of fact, don't you know that the Judges of the January Term, that the judges of both courts are the ones that select the Grand Jury and the first Petit Jury that becomes the regular panel?

A. Yes, sir.

Q. Not the prosecutor?

A. The prosecutor, I said, assists.

Q. Well maybe looking up information—  
[fol. 28] A. —looking up information.



Mr. Brown, Attorney for Defense: Oh, no we object to that.

Mr. Stark: I'll withdraw that part.

Q. Well, you know, as a matter of fact, the Prosecutor has no authority in the matter at all, don't you?

A. None whatsoever.

Mr. Stark: You're excused.

Questions by Mr. Perry, Attorney for Defense:

Q. You say the Prosecutor assisted. In what way did he assist?

A. In advising the Court, just the same as the Clerk or any of us. The Court being duly advised acts in certain ways.

Q. He advised in the selection of the Grand Jury and there were no negroes chosen on it?

A. No.

That's all.

Witness excused.

[fol. 29] • JUDSON L. STARK, a witness called by the defense, having been duly sworn, testified as follows, to-wit:

Direct examination:

Questions by Mr. Perry, Attorney for Defense:

Q. Tell the Court your name.

A. Judson L. Stark.

Q. And what is your address?

A. 5306 Kenwood, Indianapolis.

Q. And how long have you been a resident of Marion County?

A. About twenty-five years.

Q. And during the twenty-five years of your residence, how many negroes or colored persons have served on the Grand Jury, been called or served on the Grand Jury, to your knowledge?

A. I don't know. They are not required to, according to law. I know that much.

Court: Just answer the question.

A. I don't know.

Q. Now are you acquainted with a lot of colored people in Marion County?

A. Naturally.

Q. You know if there are colored people that own real estate and are residents and voters, you knew that?

[fol. 30] A. Well, I strongly suspicion it. I haven't looked at any of the deeds, but I am rather certain that some of them do.

Q. You believe there are taxpayers among the colored people?

A. Oh, yes, indeed, certainly.

Q. To your knowledge what would you say the population of negroes is in Marion County?

A. I imagine about sixty-five or seventy thousand. I don't know.

Q. And what would you say the general population is?

A. Oh, in Marion County, you say?

Q. That's right.

A. Oh, half a million, more than that.

Q. Now you know how the Grand Jury is chosen. Tell the court how.

A. It's contained in the Statutes, just exactly how it is done.

Q. I am asking you to tell the Court.

A. All right. I shall. The Courts in Marion County, by statute, hold two terms per year. That is not true of all courts, but it is of Marion County. Then the terms run from January 1st until June 30th, and then from July 1st to January 31st. At the beginning of each six months term, or prior thereto, as a matter of fact, to selecting the Grand Jury and the Petit Jury to get the regular panel, the [fol. 31] Jury Commissioners, upon order of the Judge, or upon order of the Judges, select, pursuant to law, names to go into a Jury Box. They select a large, rather large number. The law has from time to time varied on that subject.

How the Jury Commissioners select these names: they select them without regard to whether they are white or colored. They put them in the Jury Box; then on the day appointed as provided in the order and pursuant to law the County Clerk,—in this case, A. Jack Tilson—takes the box, which is under lock and key, as the Jury Commissioners have the key so that neither can get into it himself. He

shakes that around thoroughly; then the Jury Commissioners open it. The County Clerk sticks his hand in and just draws out one name from a box containing a large number of names both white and colored, and the first name drawn out is written down. Then No. 2, 3, 4, 5, until about seventy-five, whatever the Court has ordered, is drawn. That's the prospective Grand Jury list. Then they continue on drawing of about two hundred names to make up the regular panel; that is the first panel.

Q. That's the Grand Jury?

A. No, no. Then they draw out some more names to make up the petit jury.

[fol. 32] Q. I am just speaking of the Grand Jury.

A. I have told you how they did that. Then those names, subpoenas are gotten out ordering them to appear at a given time as prospective grand jurors. The sheriff goes and serves the subpoenas. The names are already selected by somebody else but he serves the subpoenas, is ordered to serve them. Then they come in. When they come in to the Court Room, the two judges sit at the table and the Sheriff or the Clerk, I don't know which one, Clerk I imagine, calls the first name; that man goes into the box, it doesn't matter who he is; then they call No. 2, call No. 3, 4, 5, 6. Then the judges begin questioning them to see whether or not they are qualified under the statute to serve as grand jurors.

There are several reasons that could excuse him. Sometimes one of them will say he is ill; maybe his wife is dangerously ill, and there are various and sundry reasons why a Court or Judge, at their discretion, may excuse one from grand jury service. The term runs for six months and it is not uncommon for the Court to hear pleas of a legitimate nature, to be released. Now the Prosecuting Attorney, however, has no power whatsoever to do any of that. It is true that they have from time to time looked up the qualifications and run the records on names, so as to be sure we [fol. 33] don't get anyone with any bad background in there. Any information of that kind is gotten at the request of the Judge handed on. Otherwise, the Prosecuting Attorney has nothing whatsoever to do with the selection of the Grand Jury.

Q. In what way, if any, did the Prosecutor assist in this last case?

A. You mean the Grand Jury that indicted Watts?

Q. Yes. Was that a regular proceeding or was it a special in this last—

A. You mean the selection of the Grand Jury?

Q. Yes.

A. It was done very regularly.

Q. And how many Grand Jurors' names—withdraw.

Were you present at the time of the selection of this last Grand Jury?

A. The one that indicted Robert Watts?

Q. Yes.

A. No, I wasn't present, but my deputies were. I mean my deputies went down and saw—

Mr. Brown, Attorney for Defense: That answers the question.

A. —that they shook up the box and things of that kind.

Mr. Brown: Move to strike out all that he has said after the word no.

[fol. 34] Court: It may go out, everything after the word no.

Q. Now were any of your deputies present?

A. Yes, my deputies are a part of me, according to law. They act in my name, place, and stead, the law says.

Q. How many names of Grand Jurors are in the box at the time when the six names are drawn?

A. I have never been permitted to look into it. I couldn't tell you. I can't tell how many names are in a box that's close to me.

Q. You don't know how many names are put in the box?

A. No.

Q. Did you ever try to find out?

A. Well, no, we never went through and counted all the people because they draw more names out of this same box.

Q. These names that go into the Grand Jury box, where do they come from?

A. That is the business of the Jury Commissioners, under instruction of the Judge of the Probate Court. The law has been changed on that subject in the last year.

Q. Do you know where the names come from that go in the box?

A. I am not present when other people do their duty, I presume they do it.

[fol. 35] Q. Do you know where they come from?

A. No, I don't. I know what the law says, but I wasn't present.

Mr. Perry, Attorney for Defense: Move to strike out all that he doesn't know.

Court: It may go out.

Q. How many persons would serve on Grand Jury in twenty-five years at the rate of twelve a year?

A. That calls for a mental operation, multiplication. You can multiply.

Q. I am asking you.

Court: I don't think he has to answer that question. I think it would be around three hundred. You can figure it for yourself, but I don't think he has to answer that question. That calls for a computation that he doesn't have to answer.

Q. I think, your Honor, he could multiply.

Court: I will sustain the objection.

Q. And you say out of three hundred persons serving on grand jury service for twenty-five years, you don't know of one negro among those three hundred, do you? If you [fol. 36] do, who was it, what is the name and address?

A. I don't know of any, but there has been years when I do know—

Mr. Perry: Move to strike it out.

Court: "I don't know of any" may stay in. The rest may go out.

Q. Now you saw the Grand Jury that was chosen for Robert Watts didn't you?

A. Yes.

Q. Were there any negroes on it?

A. No.

That's all.

Mr. Meloy, Prosecuting Attorney: No questions.

Witness excused.

Mr. Stark (to Court): If the Court please, if I said the Probate Court chose the election commissioners, if I said the Probate Court did that—they say I did—I meant the Circuit Court.



Court: You said the Probate.

Mr. Stark: I meant the Circuit.

Mr. Henry, Attorney for Defense: That's all.

[fol. 37] At this point the Court recessed.

After recess, the following proceedings were had, to-wit:

JUDSON L. STARK, a witness called by the State, having been duly sworn, testified as follows, to-wit:

Direct examination.

Questions by Mr. Meloy, Prosecuting Attorney:

Q. You are the same Judson L. Stark who testified previously?

A. I am.

Q. And what is your official capacity in Marion County?

A. Prosecuting Attorney of Marion County.

Q. And have you served previously in that capacity?

A. Yes.

Q. You may tell the Court when.

A. I was Chief Deputy from 1925 beginning January 1, '25 for four years; then Prosecuting Attorney from January 1, 1929 to January 1, 1931.

Q. And you have been Prosecuting Attorney in Marion County now since when?

A. Since 1947, January 1st.

Q. And you have also been Judge in Marion County?

[fol. 38] A. Yes, I was Judge of Marion Superior Court, Room 1, from January 1, 1943, until I became Prosecutor this time.

Q. And in your official capacity as Prosecuting Attorney now and previously in other official capacities, have you been familiar with the method of selection of Grand Juries in Marion County?

A. Yes, I have been.

Q. Now I will ask you if in your knowledge any persons were excluded from serving on the Grand Jury at any time because of their race or color or for any other reason.

Mr. Henry, Attorney for Defense: We will object to that question for the reason that would call for a conclusion, "because of race or color." The only question is, as the law lays it down, whether or not they were excluded and

had an opportunity to have been appointed, but in attempting to show "because of race or color" that would be a conclusion and would be wholly incompetent and not evidence in such an answer.

Court: Objection overruled.

A. There never has been any discrimination or effort to keep names out of the box or keep any colored person in Marion County from serving on either Grand or Petit [fol. 39] Jury.

Mr. Perry, Attorney for Defense: I am objecting to that, these conclusions of this witness. I am objecting to that.

Court: Objection overruled.

Mr. Perry: I am objecting to the question because it calls for a conclusion.

Court: He has already answered the question.

Mr. Perry: Move to strike it out.

Court: Motion to strike out overruled.

Q. Within the last three years, Mr. Stark, do you know of any incidents where any colored or negro persons have been called on the Grand Jury Venire?

A. I believe that three were called,——

Mr. Perry: I am objecting on the——

A. —on the Grand Jury venire.——

Mr. Perry: I am objecting to that question.

A. —Let me explain.

Court: Just a minute.

A. —At any rate jurors drawn from the same box——

Mr. Perry: I'm objecting.

A. —were put on.

[fol. 40] Court: I'll sustain the objection. I don't think that's responsive.

(Question read to Court: Within the last three years, Mr. Stark, do you know of any incidents where any colored or negro persons have been called on the Grand Jury venire?)

Court: Everything outside of "I believe three were called" may go out.

Q. Now those names are drawn from the same box as the Petit Jury, are they?

A. That's right.

Q. And have negroes been called and served on Petit Juries in Marion County?

Mr. Perry, Attorney for Defense: I am objecting to that question. The only question we are raising is for the Grand Jury, in this motion to quash.

Court: They're drawn out of the same box. Objection overruled. I'll admit it for whatever it may be worth.

(Question read to witness: And have negroes been called and served on Petit Juries in Marion County?)

A. I know they have been called, put in the Jury Box. [fol. 41] Mr. Perry, Attorney for Defense: I'm objecting to the answer.

Court: Objection overruled.

Q. Petit Juries, now.

A. Yes. As to whether or not—as to the question of actually serving or not—I remember last year, I believe in the Fruster Jones case, or another one—Mr. Perry was defending as pauper attorney. She was excused peremptorily after answering the questions perfectly, a very fine colored person, I'd say, the wife of a dentist—

Mr. Perry: I'm objecting—

Court: Just a minute. We are just going to have one person talk at one time, because the Court Reporter can't get everybody's talk in the record, and when you have any objections to make—

Mr. Perry: I want to make an objection—

Court: —wait until the question is answered and then you can make your objection;—

Mr. Perry: I am objecting to the question—

Court: —Just a minute! —and make your answers [fol. 42] responsive to the question, Mr. Stark, or otherwise I will have to strike them out, and we will waste a lot of time, which isn't necessary.

Mr. Stark: I am trying to, Your Honor.

Mr. Perry, Attorney for Defense: I want to explain: in this question he mentioned my name on this case and I wash't even up there. I move my name be stricken out of the record.

Court: Just a minute now. It's already in.

(Answer read again to Court: Yes. As to whether or not—as to the question of actually serving or not—I remember last year, I believe in the Fruster Jones case, or another one—Mr. Perry was defending as pauper attorney. She was excused peremptorily after answering the questions perfectly, a very fine colored person, I'd say, the wife of a dentist—)

Court: That may go out. It isn't responsive. Everything as concerns the Jones case may go out. It isn't [fol. 43] responsive. Next question.

That's all.

Cross-examination.

Questions by Mr. Henry, Attorney for Defense:

Q. Mr. Stark, were you the Prosecuting Attorney in June, I believe, last year, when this last Grand Jury was selected?

A. That's right, selected in July.

Q. And your deputies, I believe you testified on the examination direct when you were on the stand before, that you weren't present but your deputies were there, some of your deputies were there.

A. I think one of my deputies was there.

Q. You have testified that there was a box in which the names of the seventy-five persons were selected?

A. From which they were drawn.

Q. That's what I am speaking of.

A. More than that was drawn.

Q. But seventy-five was drawn from which to draw the panel of the Grand Jury out of that box?

A. Whatever the record shows up there. I didn't look at the Court's order.

Q. Now do you, you don't know whether or not—  
Withdraw that.

[fol. 44] There were colored people that appeared in the box, that's what you said, isn't it?

A. Yes.

Q. And you believe that there were three colored names drawn from that box from which the selection would be made?

A. I do know there were names in the box and that they were drawn out, colored.

Q. But you do know that when it came time to make the final selection that it was very convenient for the colored names to be eliminated?

A. No, I don't know. It isn't even the truth.

Mr. Meloy, Prosecuting Attorney: Object to that.

Mr. Henry: I'll withdraw that.

Court: Strike that question out, please.

Q. You do know that the colored names were eliminated from the selection?

A. No, I do not.

Q. You don't—

Mr. Meloy: Object—

A. Let me answer it.

Q. You don't know of any—

Court: Just a minute. You are not letting the witness answer the question, and the Prosecutor over here is making an objection.

[fol. 45] Mr. Henry: He had answered it, but he didn't make any motion to strike, so no question is before the Court.

Court: He started to say something else. Just give them a little time to answer questions.

Q. But now, you do know that after the names are selected from the box from which the Grand Jury is selected—

A. —drawn from the box.

Q. Drawn from the box then. Out of that number selection is made and I believe you testified that the Court makes the selection?

A. That's right. They come in numerical order, No. 1 first.

Q. And no colored man was ever named in your experience as Juror No. 1?

A. In the Grand Jury, you mean?

Q. Yes.

A. Well I don't know who was put in the box at that time, or why they were excused, if they were, but when it was



finally finished the Jury didn't have—there was no colored person on the Grand Jury.

Q. Yes. Now then during the twenty-five years that you have lived in the City of Indianapolis, out of a large number of colored people that live there and are voters and property owners, no colored person, to your personal [fol. 46] knowledge, has ever been selected to serve on Grand Jury?

A. Well I don't know that because I haven't seen all of them.

Q. Don't you know, Mr. Starks, that such an unusual thing as that would have called your attention to it?

A. I don't know that.

Q. You never have heard of any colored man serving on Grand Jury, have you?

A. Well I don't know whether I have or not. It wouldn't surprise me if one did.

Q. During your actual practice of twenty-five years you haven't heard of that, have you?

A. That's right.

Q. You have been Prosecuting Attorney much of that time, haven't you?

A. That's right.

Q. Judge part of that time?

A. That's right.

Q. Had a colored man served on the Jury wouldn't you have known it?

A. Not necessarily. In fact I would just as soon have a colored man on there as a white man. It wouldn't surprise me any. I wouldn't remember anything about it at all.

Q. But you have never heard of such a thing, have you? [fol. 47] A. I don't recall whether I have or not. I don't recall. That's the truth. I might have.

Q. You have a better recollection than I have, if you have. Now, Mr. Stark, you know as Prosecuting Attorney and as a former Judge, that the law has provided that where colored people live in sufficient numbers and are excluded for a period of ten, fifteen, twenty years, it is an exclusion because of race prejudice?

Mr. Meloy, Prosecuting Attorney: Object to that.

Court: Objection sustained. That would only call for a conclusion on his part.

Mr. Henry: I just asked him if he knows that to be a law.

Mr. Meloy: I am objecting.

Court: Sustained.

Q: Now then I believe you testified that your office assisted in the selection of the Grand Juries.

A: I didn't say that. Somebody else said that. I did say that we are interested enough that we run some records and make some little investigation and make that available if it is anything very bad, but we have nothing to say about who is really selected. In fact we don't even question the witnesses at all.

[fol. 48] Q: You want to change that evidence that you gave sometime ago that you assisted?

A: I never said that. Somebody else said that.

Q: You have a very bad memory, do you?

A: My memory is good.

Court: Just a minute. We'll not have a—we're not here for the lawyers to display their intellectual capacities.

Mr. Henry: That's all.

Witness excused.

MR. GLENN W. FUNK, a witness called by the State of Indiana, having been duly sworn, testified as follows, to-wit:

Direct examination.

Questions by Mr. Meloy, Prosecuting Attorney:

Q: You may state your name.

A: Glenn W. Funk.

Q: And your official capacity in Marion County?

A: Chief Deputy Prosecutor, Marion County.

Q: And how long have you served in that capacity?

A: Since March 1st, 1947.

Q: Do you know, from your own knowledge from whence [fol. 49] names come which are put on Grand Jury venire?

A: I do.

Q: From whence?

A. They are taken from a list of the taxpayers of Marion County, placed in a jury box, and from that box the names are drawn.

Q. And do you know of any occasion where a name of a negro or colored person was drawn for Grand Jury?

A. I do.

Q. When was that?

A. January term, 1948.

Q. And how many were drawn, if you know?

A. I know definitely of two.

Q. Men or women?

A. Men.

Q. And you may state whether or not they actually served on Grand Jury, if you know.

A. They did not.

Q. And if you know the reason, you may so state.

A. They asked to be excused.

Mr. Perry, Attorney for Defense: I am objecting to that. Move to strike it out, for the reason that if there were people called for Grand Jury, they should be brought here in Court. That's the best evidence, and this witness has no reason to [fol. 50] testify why they were excused. That's a conclusion on his part.

Court: I'll let it go out.

A. I was present at the selection.

Q. The two colored persons were actually in the Jury Box, were they?

A. That's right.

Q. And did you hear anything they said to the Judge?

Mr. Brown, Attorney for Defense: If the Court please, didn't this witness testify this occurred in 1948?

A. That's correct.

Mr. Brown: This was long prior to that time. In the interest of time the defendant objects.

Court: I am sustaining the objection as to what happened there. As to the showing they were drawn I will overrule that. Next question.

Mr. Meloy: That's all.

[fol. 51] Cross-examination.

• Questions by Mr. Perry, Attorney for Defense:

Q: How long have you lived in Marion County?

A: Since 1927.

Q: About twenty-one years?

A: That's right; Mr. Perry.

Q: And to your knowledge has any negroes, colored persons, served on the Grand Jury in Marion County during that time?

A: To my knowledge?

Q: Yes.

A: No.

Mr. Perry: That's all.

Mr. Meloy: That's all.

Witness excused.

And this was all the evidence given in the hearing on Motion to Quash Indictment.

[fol. 52] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 53] IN CIRCUIT COURT OF SHELBY COUNTY

### **Verdict and Judgment**

#### **VERDICT OF THE JURY**

We, the Jury, find the defendant, Robert Austin Watts, guilty of murder in the first degree while engaged in an attempt to perpetrate the crime of rape as charged in the second count of the indictment herein, and that as punishment therefor he do suffer death.

Alvin B. Coons, Foreman.

#### **JUDGMENT**

It is therefore ordered, adjudged and decreed by the Court that the defendant Robert Austin Watts is guilty of Murder in the first degree while engaged in an attempt to perpetrate the crime of rape as charged in the second count

of the indictment herein; that as punishment therefor he do suffer death, that said punishment of death shall be inflicted by causing to pass through the body of the said Robert Austin Watts a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of said Robert Austin Watts until said Robert Austin Watts is dead. The Court fixes the 10th day of May, 1948 before the hour of sunrise on said day as the time at which said death sentence shall be carried out, by the Warden of the Indiana State Prison, or, in case of his death, disability, or absence, his deputy.

Said execution shall take place inside the walls of the Indiana State Prison, at Michigan City, Indiana, in a room arranged for that purpose.

[fol. 54] IN CIRCUIT COURT OF SHELBY COUNTY

[Title omitted]

# DEFENDANT'S MOTION FOR NEW TRIAL

(Excerpts)

Comes now the above defendant, Robert Austin Watts, and moves the Court for a new trial in this case for the following reasons and upon the following grounds, towit:

## Number One

Irregularities in the proceedings of the Court and abuse of discretion by which the defendant was prevented from having a fair trial in this towit:

(a) That the Court erred in overruling the motion of the defendant, Robert Austin Watts, to quash the indictment filed herein and each count thereof.

## Number Eighteen

Errors of law occurring at the trial in this towit: That the Court erred in overruling the objections of the defendant to the introduction in evidence of State's Exhibits Numbered 26, 27 and 28 offered by the State and objected to by the defendant after it had been proven by the Defendant



that said confession was made by the defendant while under the influence of fear produced by threats and intimidations and undue influence and after the Defendant had been confined in jail and treated with unnecessary rigor, which offers, objections and rulings of the Court were in the words and figures following, to wit:

Q. All right. I will ask you—I will hand you State's Exhibit Number 26 again and ask you to note a change in the typing by ink and initialing in the margin there. Take a look at that.

A. There.

Q. Was that done the same night?

A. It was.

[fol. 55] Q. And were you present when that change was made?

A. I was.

Q. Was the defendant Watts present?

A. He was.

Q. And look at the initial in the margin. What initial is that?

A. R. W.

Q. Who put them there?

A. Robert Watts.

Q. Was it explained to him at that time what the correction was for?

A. It was.

Q. Now, Mr. Reasner, I will hand you also State's Exhibit Number 27 and ask you when you saw that.

A. November 18th, about 3 A. M. in the morning.

Q. Was that shortly after these other exhibits here were written up there?

A. Yes, sir.

Q. Was that at State Police Headquarters?

A. State Police Headquarters, Stout Field.

Q. I will ask you if you know whose signature is attached to the bottom of that?

A. Robert A. Watts.

Q. Is that this defendant?

A. Yes.

Q. In whose presence was that signature placed there?

A. Sheriff Magenheimer, myself, Robert Shields, and Captain Barton.

Q. And do all those names appear on there as witnesses?

A. They do.

Q. Did you see all of them put their names on there?

A. I did.

Q. Was that in the presence of the defendant?

A. It was.

[fol. 56] Q. Were those all present when the defendant signed his name?

A. They were.

Q. Any other person present at the time?

A. Yourself.

Q. Now had you been present at the time this State's Exhibit 27 was taken from the defendant Robert A. Watts?

A. I was present.

Q. And who took the statement?

A. You did, Mr. Stark.

Q. And state whether or not the statement was written down or was dictated to a stenographer.

A. It was dictated to a stenographer.

Q. Who was present other than myself and yourself?

A. Robert Watts, Sergeant Shields, and John Barton.

Q. And after it was reduced to writing or typing, I will ask you if before the defendant signed it and before these names were attached as witnesses, if this State's Exhibit Number 27 was read to the defendant Watts.

A. It was.

Q. By whom?

A. Yourself.

Q. I will ask you if, whether the defendant Watts was given an opportunity to look at it himself.

A. He was.

Mr. Stark, Prosecuting Attorney: Now the State will offer in evidence

(The exhibits were handed to Defense Counsel to read and compare before being offered in evidence.)

At this point a recess was taken.

After recess, the following proceedings were had, to-wit:

[fol. 57] Mr. Stark: State offers in evidence its exhibits 26, 27 and 28.

Mr. Brunner, Attorney for Defense: Let the record show that the defendant objects to the introduction of these

exhibits for the reasons heretofore stated. (i.e., that anything that was said by the defendant to this officer, in the presence of officers, was made under the influence of fear, produced by force, threats, and intimidation.)

Mr. Perry, Attorney for Defense: For the further reasons: No. 1, that the confessions or statements were made by the defendant when he was without Counsel. No. 2, that the defendant was not properly advised as to his constitutional rights to testify and that he did not have to make any statement unless he wanted to and that if he did sign any statements it would be used against him in Court. No. 3, that the said confessions and statements violate Section 58 of the Constitution of the State of Indiana. No. 4, that said confessions or statements violate the 5th, 6th and 14th Amendments to the Federal Constitution. No. 5, that the State has not proven the corpus delictae of its case before offering the confessions or statements of this defendant.

Court: Objection overruled.

Show State's Exhibits 26, 27, and 28 introduced in evidence and read and read to the Jury.

[fol. 58] IN THE SUPREME COURT OF INDIANA, NOVEMBER TERM, 1947

No. 28447

ROBERT AUSTIN WATTS, Appellant

VS.

STATE OF INDIANA, Appellee

ASSIGNMENT OF ERRORS—Filed June 30, 1948

The Appellant says that there is manifest error in the judgment and proceedings in this cause in the following particulars:

1

The Court erred in overruling appellant's motion for a new trial.

2

The Court erred in overruling appellant's motion to quash the indictment herein and each count thereof.

3

That the Court erred in overruling appellant's verified motion to suppress evidence.

4

That the Court erred in overruling the appellant's written motion for a directed verdict of not guilty as to each count of the indictment herein filed after the State of Indiana had rested its case in chief.

5

That the Court erred in overruling appellant's written motion to instruct the jury to find the appellant not guilty as to each count of the indictment herein after the conclusion of the evidence in chief of the appellant, the rebuttal evidence of State of Indiana and the surrebuttal evidence of the appellant.

6

That the Court erred in refusing to discharge the jury on motion of appellant for misconduct of counsel for State of Indiana in making remarks in argument.

[fol. 59]

7

That the Court erred in refusing to give to the jury instruction Number 8 tendered by the appellant.

8

That the Court erred in refusing to discharge the jury on motion of the appellant for misconduct of counsel for the State of Indiana during cross examination of appellant.

9

That the Court erred in compelling the appellant to answer questions which the appellant had indicated to the Court that he declined to answer because he chose to exercise his constitutional right and refused to answer said questions for the reason that the answer to which might tend to incriminate him for a crime or an alleged crime or subject him to a criminal prosecution.

10

That the Court erred in overruling appellant's motion to reopen the case and hear further evidence.

11

That the Court erred in admitting in evidence State's Exhibit Number 26.

12

That the Court erred in admitting in evidence State's Exhibit Number 27.

13

That the Court erred in admitting in evidence State's Exhibit Number 28.

14

That the Court erred in admitting in evidence State's Exhibit Number 29.

Wherefore, the appellant prays that the judgment be reversed.

(Signed) Warren M. Brown, Attorney for Appellant.

[File endorsement omitted.]

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[fols. 60-60a] Clerk's Certificate to foregoing transcript omitted in printing.



[fol. 61]. IN THE SUPREME COURT OF INDIANA

No. 28447

ROBERT AUSTIN WATTS, Appellant,

vs.

STATE OF INDIANA, Appellee

APPEAL FROM THE SHELBY CIRCUIT COURT

Come now the parties by counsel and the court, being advised in the premises, Affirms the judgment of the court below with the following opinion pronounced by Starr, C. J.

OPINION—December 20, 1948

The appellant was tried upon an indictment returned by the Grand Jury of Marion County in two counts; the first of which charged murder in the first degree of one Mary Lois Burney by shooting; and the second charged the same murder while attempting to rape the said Mary Lois Burney. To this indictment appellant entered a plea of not guilty and a special plea of insanity. Appellant was convicted on the second count and sentenced to be electrocuted. The errors assigned will be considered in the order presented by the briefs.

Appellant attempted to question the indictment by a motion to quash, which was overruled by the trial court. The appellant is a member of the negro race. The only reason [fol. 62] urged for the sustaining of this motion was that in the selection of the grand jury, which returned this indictment, negroes were excluded from service because of their race and color. This question cannot be raised by a motion to quash. Any irregularity in the selection, impaneling or swearing of a grand jury must be raised by a plea in abatement. *Bottorff v. State* (1927) 199 Ind. 540, 156 N. E. 555; *State v. Jackson* (1918) 187 Ind. 694, 121 N. E. 114. A motion to quash an indictment only reaches matters apparent on the face thereof. §9-1129 Burns' 1933, 1942 Replacement; *State v. Jackson*, supra; *Katzen v. State* (1922) 192 Ind. 476, 137 N. E. 29; *Bottorff v. State*, supra, and does not authorize searching the record preceding the indictment. *Swain v. State* (1939) 215 Ind. 259, 18 N. E.

(2d) 921; *Bottorff v. State*, supra. It was not error, therefore, to overrule this motion.

In passing, however, we desire to state that the trial court did hear evidence on this motion, which evidence was contradictory. There was ample evidence from which the trial court would have been justified in finding that negroes were not so excluded from the Grand Jury of Marion County which returned this indictment. For example, one witness, Glenn Funk, testified that within the past two years he knew of two negroes who were drawn as members of a jury in the Marion County Criminal Court, but they did not serve. Another witness, Judson L. Stark, the Prosecuting Attorney of Marion County, testified that the drawing was regular and that names are selected for jury service without regard as to whether they are white or colored; [fol. 63] that there were three negroes called on the grand jury venire within the last three years. Another witness, Glenn W. Parrish, a deputy clerk, testified that no discrimination was shown in selecting names to go into the jury box; that there are many colored persons names in the box, and that he had seen the names of colored persons drawn from the box and selected. See *Swain v. State*, supra. There was no proof of a systematic effort to exclude negroes from jury service.

Appellant insists that the court erred in admitting in evidence his written confession of the crime charged. It is contended that the undisputed evidence shows that this confession was made by the appellant under the influence of fear produced by threats, intimidation and undue influence, which renders this confession inadmissible in evidence as provided by §9-1607 Burns' 1933, 1942 Repl.

At the time, during the trial, when the exhibits incorporating appellant's confession were offered in evidence by the State, appellant objected to these offers on the ground that they had been signed by appellant under the influence of fear produced by threats, intimidation and undue influence. Thereupon, out of the presence and hearing of the jury, the trial court accorded a full hearing on the issues presented by the objection. Appellant's evidence was to the effect that he was not guilty; that prior to his confession he had been beaten, starved, threatened and otherwise abused to such an extent that he signed his confession under the influence of fear. This evidence was contradicted in detail by the testimony of various competent witnesses who

[fol. 64] testified for the State. This evidence on admissibility being conflicting, the court's ruling adverse to appellant cannot be questioned in this appeal as we cannot weigh the evidence. *Dixon v. State* (1946) 224 Ind. 327, 67 N. E. (2d) 138; *Hawkins v. State* (1941) 219 Ind. 116, 37 N. E. (2d) 79; *Hicks v. State* (1937) 213 Ind. 277, 11 N. E. (2d) 171, 12 N. E. (2d) 501; *Anderson v. State* (1933) 205 Ind. 607, 186 N. E. 316. This case is not controlled by *Johnson v. State* (1948) — Ind. —, 78 N. E. (2d) 158. There the evidence suggesting force and coercion was undisputed.

If appellant's confession was not made under the influence of fear produced by threats, intimidation or undue influence, then the fact that, before making his confession, he was taken from place to place in Indianapolis and held for several days without process, would not be sufficient in this state to withhold the confession. *Hicks v. State*, supra.

By virtue of §9-1706 Burns' 1933, 1942 Replacement, the trial court saw fit, before trial, to have appellant examined by physicians as to his sanity. Appellant stated in his brief that it was error to overrule his objection to the report of these physicians. We assume that he intends, by this objection, to question the competency of the testimony of these physicians. Appellant, in his brief, has failed to point out why it was error to overrule this motion, or the basis of his objection, or to cite any authorities, or to show wherein he was harmed. By this failure, no question is raised. Rule 2-17 (f) Rules of the Indiana Supreme Court, 1946 Rev. [fol. 65] Appellant insists that it was error for the trial court to refuse to instruct the jury to find the appellant not guilty at the close of all the evidence. It is his contention that the *corpus delicti* was not proven. The State's evidence was to the effect that the deceased had met a violent death resulting from assault with a deadly weapon. This, considered with the confession, was ample to establish the *corpus delicti*. *Hurst v. State* (1944) 222 Ind. 599, 56 N. E. (2d) 493; *Evans v. State* (1927) 199 Ind. 55, 155 N. E. 203; *Griffiths v. State* (1904) 163 Ind. 555, 72 N. E. 563; Ewbank's Indiana Criminal Law (2d Ed.) §517.

Misconduct of the prosecuting attorney in his closing argument is charged. In this argument he stated to the jury, "If he (referring to the appellant) gets life in the Indiana State Penitentiary, according to the rules of the

Penitentiary, they are permitted a year of parole after 12 years service." This was proper argument as the prosecutor had the right to express his opinion as to the amount of punishment the jury should mete out. *Blue v. State* (1946) 224 Ind. 394, 67 N. E. (2d) 377. The court's admonishment to the jury to disregard these remarks and not to consider them, was more than fair to the appellant.

Also, it is complained of that the prosecuting attorney in his cross examination of the appellant, questioned him as to the identity of two certain knives, and in doing so displayed the same to appellant; whereupon, appellant stated that from where he was stationed, he was unable to see them.

[fol. 66] The prosecutor then stated "This is as close as we want you to have them." The jury was then admonished by the court not to consider this remark. Also, it appears that in this cross-examination the prosecutor, when the witness answered a certain question in an argumentive way, stated that his answer was a "darn lie." The jury was also admonished not to consider this remark of the prosecutor.

It is our opinion that, although the foregoing remarks of the prosecutor are not to be condoned, they were not of sufficient gravity or importance as to warrant the setting aside of the submission. The court's action in telling the jury not to consider these remarks was sufficient to warrant a fair trial.

Appellant complains of the court's refusal to give his tendered instruction No. 8. He has failed in his briefs to set out any of the instructions that were given by the court. Error, therefore, cannot be predicated on this refusal. Rule 2-17 (e) of this court, as to the requirements of appellant's brief, provides among other things: "When error is predicated on the giving or refusal of instructions the statement must recite all of the instructions that were given; "It will be presumed that the instruction so tendered and refused, was covered by other instructions. *Adams v. State* (1938) 214 Ind. 603, 17 N. E. (2d) 84.

The next question presented is that the appellant was compelled to answer certain questions over the objection that the same would tend to incriminate him. It is sufficient [fol. 67] to say that all these questions were asked on cross examination of appellant about a matter about which he had elected to testify as a witness in his own behalf. In



view of his direct examination, the allegedly prejudicial questions were proper on cross examination. *State v. Schopmeyer* (1935) 207 Ind. 538, 194 N. E. 144.

It is urged that the verdict is not sustained by sufficient evidence. The evidence most favorable to the state is substantially as follows: that on the morning of the 12th day of November, 1947, the deceased was alive; that later that day her body was found in the bedroom of her home in Indianapolis; that she had been killed by the discharge of a shotgun, the charge of which had struck her in the head; that the evidence disclosed that the gun had been fired at close range, and that she had been killed in the room where her body was found. The evidence also disclosed, that prior to her death there had been a struggle between her and her assailant as was indicated by the bruises on her body and the general disarray and condition of the furniture in the home; that on the same day another woman in the same neighborhood had been attacked in her home by a colored man who was attempting to rape her; that she escaped him by fleeing from her house naked; that on the same day and before the offense charged herein had been discovered, appellant was arrested for this attempted rape and identified by this woman as her attacker; that thereafter the appellant made a full written confession of his guilt of the offense herein charged; that shortly after making this confession, he led the officers in whose custody he was, to a lonely place in the City of Indianapolis, where he had tossed the shotgun. This spot was far from the scene of the crime. The gun was still there. This gun was the property of the husband of the deceased and he had kept it in the home where he and deceased resided; that the empty shotgun shells found at the place of the crime had been fired from this gun. It also appears from the State's testimony, that the appellant admitted the perpetration of this crime to a fellow prisoner while he was being held in the Marion County Jail.

It is our opinion that this evidence amply supports the verdict, although the State detailed other and further evidence which it is not necessary to recite for the purpose of this opinion.

Lastly, it is insisted that a new trial should have been granted on account of newly discovered evidence. After



both sides had rested, and before argument, appellant moved to reopen the case for the purpose of introducing certain evidence. The only purpose of this evidence would have been to impeach a certain witness of the State on a collateral matter which would have rendered it inadmissible. It was not error to deny this motion. Had this evidence been discovered after the trial, and had it not been irrelevant, but simply impeaching, a new trial could not have been granted on account of same. *Sullivan v. State* (1937) 212 Ind. 79, 6 N. E. (2d) 951; *Gavalis v. State* (1922) 192 Ind. 42, 135 N. E. 147; *Spaulding v. State* (1904) 162 Ind. 297, 70 N. E. 243.

Finding no reversible error, the judgment is affirmed.

[fol. 69] IN SUPREME COURT OF INDIANA

ORDER DENYING PETITION FOR REHEARING

And afterwards, to wit: On the 11th day of January 1949 the Court, being fully advised, denied the petition for rehearing heretofore filed herein by appellant on January 7, 1949.

Clerk's Certificate to foregoing papers omitted in printing.

[fol. 70] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 344, Misc. —

On petition for writ of Certiorari to the Supreme Court of the State of Indiana.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; GRANTING PETITION FOR WRIT OF CERTIORARI AND TRANSFERRING CASE TO APPELLATE DOCKET—FEBRUARY 28, 1949.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in

15  
*forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same hereby, granted. The case is transferred to the appellate docket as No. 610.

The stay order of January 31, 1949 is continued and it is ordered that execution of the sentence of death be stayed pending the final disposition of this case by this Court.

(1287)